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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 123.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE IN ERROR.

Statement.

This case comes before the court with concurring decisions below granting the petition for the writ of mandamus to compel the issuance of a patent upon the homestead entry of Allen L. Newton.

Newton made homestead entry at the district land office, Seattle, Washington, September 8, 1904, upon which he made proof in commutation of his entry and paid the purchase price, whereupon receiver's receipt and certificate of final entry were issued to him November 21, 1904. At the expiration of two years from the issuance of receiver's receipt on final entry, no contest, protest, or other proceedings had been instituted against said final entry, nor was any such proceeding instituted until November 27, 1908, more than four years after the issuance of the receiver's receipt on final entry, when proceedings were directed upon an adverse report of a forest officer charging, in effect, that the entryman had not complied with the law in the matter of residence and cultivation, and as result of a hearing ordered on this charge Newton's entry was ordered canceled March 23, 1912.

Upon a petition filed with the Secretary of the Interior under date of January 29, 1918, that officer, by order dated May 14, 1918, in view of the decision of this court in the case of Lane *vs.* Hoglund (244 U. S., 174), revoked the order of cancellation and ordered the reinstatement and patenting of Newton's entry. Acting under this order the Commissioner of the General Land Office, under date of June 4, 1918, approved Newton's entry for patent, and patent was about to issue when the Department of Justice requested the issuance and delivery of the patent be withheld; whereupon these proceedings were instituted to compel the issuance and delivery of the patent, as directed by the proviso to section 7 of the act of March 3, 1891 (26 Stats., 1095-1099), which reads:

> *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent con-

veying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

The answer on behalf of the defendant admitted the above-stated facts, and in addition thereto alleged that the land embraced in Newton's entry was withdrawn with a view of inclusion within a forest reserve December 27, 1902; that the allowance of Newton's entry and the issuance of the receiver's final certificate "were obtained by said relator New-"ton fraudulently and by false representations and proofs, "to the effect that he had made settlement upon the land "prior to the withdrawal of said land as aforesaid, and that "he had since said settlement continuously resided upon the "same and had placed substantial improvements thereon and "had cultivated a portion of said land and raised crops "thereon." It will be noted that this is but a general traverse of Newton's proof showing.

It was further alleged that since the institution of these proceedings and the issuance of the rule to show cause a suit in equity had been brought in the United States Circuit Court for the Western District of Washington for the cancellation of the final receipt and to quiet title to said land in the United States. For the information of the court it should be said that all proceedings in this cause have been suspended to await the result of this action.

Relator demurred to this answer, designating the points for argument.

1. That the decision of the court in the case of Lane, Secretary, *ex.* Hoglund, *supra*, disposes of all matters set forth in said answer, and

2. That the allegations of fraudulent representations by the relator are indefinite and insufficient to constitute a defense, and that, so far as disclosed, the allegations indicate

what would be plain on a more definite statement, namely, that they relate solely to the quality of the residence of Newton upon the land entered as meeting the terms and requirements of the homestead law, inquiry into which was clearly barred after the expiration of two years from the issuance of receiver's receipt on final entry, and cannot be inquired into in these proceedings.

In both the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia, it was earnestly urged on behalf of the defendant that the demurrer admitted fraud on the part of the relator, which was sufficient to take the case out of the operation of the statute, and on that ground it was sought to differentiate this case from the holding of this court in the case of Lane *vs.* Hoglund, *supra*.

In both courts below, in sustaining the petition for the writ, it was held, in effect, that by the proviso to section 7 of the act of 1891 the jurisdiction with regard to inquiry into the validity of a homestead entry was transferred from the Land Department to the courts, where, at the expiration of the two years' limitation after issuance of final receipt, no contest, protest, or other proceeding had been directed against the entry; that the allegations of the answer with respect to the alleged fraud were not sufficient to constitute a defense; that a mere declaration of fraud could not restore jurisdiction after it has been lost by the running of the statute; that to resume jurisdiction in such a case recourse must be had to a proceeding in equity, a jurisdiction not possessed by the Land Department; that this action is not to perpetuate a fraud, or compel the performance of an act which would have that result, but to compel the performance of a mere ministerial act imposed by statute, and that if fraud in fact exists it can be remedied in the courts as Congress has specially directed.

In the brief filed in this court under the assignment of errors from the decision of the Court of Appeals of the District of Columbia, three propositions are submitted:

First. A writ of mandamus should not issue in this case, in view of the pendency of the suit in equity brought to cancel for fraud the receipt and certificate issued on relator's entry.

Second. The relator, being guilty of fraud, is not entitled to relief.

Third. The proviso to section 7 of the act of March 3, 1891, 26 Stat., 1095, 1099, does not bar action by the Secretary in cases of fraud.

ARGUMENT.

In answer to these contentions we say:

The decision of this court in the case of Lane, Secretary, etc., vs. Hoglund, 244 U. S., 147, controls.

In the Hoglund case the land involved was within the limits of a forest reservation, established by proclamation May 6, 1905. Proceedings were instituted against Hoglund's entry after the expiration of the two years following the issuance of receiver's receipt on final entry. On the record made in these proceedings, the Secretary of the Interior, in ordering cancellation of Hoglund's entry, specifically held—

> "that the defendant has not complied with the law as to residence and cultivation of land; that his alleged residence upon the tract prior to the date of his entry, and until May, 1906, was in the nature of occasional visits."

and because of this finding he adjudged that the forestry withdrawal of 1905 had attached. Hoglund, in his final proof, claimed continuous residence from settlement in 1902, and it was argued that his receiver's receipt "was fraudulently obtained by him on false proof." If the Secretary of the In-

terior retained jurisdiction to inquire regarding Hoglund's compliance with law after the expiration of two years from issuance of receiver's receipt on final entry, then the holding of that officer could not have been reviewed on mandamus proceedings. But this court held that the jurisdiction of the Land Department to inquire regarding Hoglund's entry had been lost, and that nothing remained but the performance of a ministerial duty to issue the patent as by the statute exacted. In the opinion of this court in the Hoglund case, at page 181, it was said:

> "* * * Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry and that during that period *no proceeding has been initiated or order made which calls in question the validity of the entry.* In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course. Thus in a case like this, where according to the conceded facts no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent." (Italics ours.)

It was supposed that with this clear expression of the court no further difficulty would arise in the administration of the proviso to section 7 of the act of March 3, 1891, and just here it should be stated that when the proceedings in mandamus were instituted in the Hoglund case like proceed-

ings were begun in two other cases, whereupon it was agreed with the officers of the Interior Department that further suits would not be filed, and that should the Hoglund case result in issuance of the writ of mandamus other cases of a like nature might be revived in the Land Department on the filing of a petition invoking supervisory power to correct the previous mistake in cancellation of an entry after the running of the statute. It was in accordance with this understanding that petition for the reinstatement and patenting of your relator's entry was filed with the Land Department following the decision of this court in the Hoglund case, and, as appears by the record, the officers of the Land Department found no difficulty in construing the decision of this court and applying it in favor of your relator, recalling the previous order cancelling his entry and directing its reinstatement and patenting. It is now argued in the brief filed in this court that relator waited five years after cancellation of his entry before instituting proceedings. We take it that this explanation is sufficient without further consideration in this contention.

It might also be said at this point that certain of the officers of the Department of Justice were never satisfied with the result of action in the Hoglund case, and it was because thereof that the Secretary of the Interior was requested to withhold the issuance to your relator of the patent necessitating the institution of proceedings in mandamus. These same officers directed the answer to be filed and have prosecuted the proceedings in both courts below on behalf of the plaintiffs in error

Let us now look to the record in this case: It is shown that your relator, after full compliance with law and the regulations of the Land Department, made his entry of the land here involved; that he submitted proof after due notice by publication in commutation of his homestead without protest or objection, and that he paid the purchase price and received receiver's receipt and certificate on final entry. At

the expiration of two years from the issuance of receiver's receipt on final entry, no protest, contest or other proceeding had ever been filed against your relator's entry, and it was not until about two years later, or about four years after the issuance of the receiver's receipt on final entry, that investigation was directed against your relator's entry, *not upon any charge of fraud*, but upon the report of a forest officer challenging your relator's compliance with the homestead law in the matter of residence and improvements. It must be clear, then, that the Land Department had no jurisdiction to entertain these proceedings, and if this be true, the record made therein is but naked paper, and of no effect for any purpose. When these proceedings were directed against your relator's entry, the Land Office holding approved by the Department in the case of Mertie C. Traganza, 40 L. D., 300, was in force. Thereunder the statute of 1891 "had no reference to proceedings by the United States, or its officers or agents," and did not "affect the conduct or action of the Land Department in taking up and disposing of final proofs of entrymen *after the lapse of the two years mentioned in the act.*"

The answer in this cause, as before stated, while using the terms "fraudulently and by false representations and proofs," merely makes a general traverse of your relator's showing on final proof with respect to settlement, residence, improvements, and cultivation and amounts to nothing more than a statement of the conclusions of the pleader. There is an entire absence of any reference to facts sufficient to set up fraud as a defense, assuming that such facts properly pleaded could at this late day restore the jurisdiction of the Land Department to inquire therein, its jurisdiction having been lost by failure to institute proceedings against your relator's entry within the statutory period of two years following the issuance of receiver's receipt on final entry.

The only possible support that can be found in the answer to the veiled charge of fraud is the statement that "said re-

spondents allege that the evidence in the case clearly supports the conclusion that the issuance of final receipt and final certificate was fraudulently procured through false testimony." The evidence here referred to is evidently the evidence taken in the proceedings begun after the Land Department had lost jurisdiction to inquire into relator's compliance with the law, and here, also, we have but a conclusion unsupported by any recitation of facts shown in said proceedings which might have enabled the court to test the reasonableness of the conclusion stated, if deemed material.

In commenting upon this situation, the Court of Appeals in its decision in this cause used the following language:

> "The vague and evasive language here employed to set up fraud, without any attempt to justify the delay, is indicative of a fictitious defense."

When jurisdiction was assumed by the Land Department and proceedings directed against your relator's entry after the statute had run, and when the record of said proceedings was reviewed by the Secretary of the Interior, no judgment of fraud was entered, the judgment of cancellation being based merely upon a finding of failure on the part of your relator to show compliance with the homestead law in the matter of residence.

For the information of the court, we append to our brief a copy of the decision of the Secretary of the Interior when cancellation of your relator's entry was ordered, and in order that the situation may be better understood, as the records of the Land Department are always available to this court, we have also appended a copy of the report of the special agent who, after examination, made report upon your relator's entry.

From this report it will be seen that the field service was cognizant of the running of the statute and for that reason, within the two-year period, made a mere formal protest

hoping thereby to toll the statute. If they had data sufficient on which to base adverse proceedings and delayed action until jurisdiction was lost by expiration of time, the proceeding later begun was in any event barred. The report indicates, however, that there was never any good reason for attacking the entry, even in the absence of the statute.

When the record in this case is reviewed in the light of the brief filed in this court on behalf of the plaintiffs in error, it is apparent that the indefinite charges with respect to fraud on the part of your relator amounts to nothing more than a charge that he had failed to comply with the requirements of the homestead law, and particularly with respect to the quality of his residence, as viewed in the record made in the proceedings directed by the Land Department after the statute had run.

On page 13 of plaintiffs' brief it is said:

> "The answer alleged that the allowance of his entry in the face of the withdrawal was secured by false and fraudulent representations with respect to prior settlement, residence, and cultivation.
>
> Again, to warrant the issuance of receiver's receipt and register's certificate, it was essential that Newton, by the proof made by him should also show continuous residence upon the land and substantial cultivation from his first settlement until date of proof. The proof he offered was commutation. Section 2301, R. S., as amended by the act of March 3, 1891, ch. 561, sec. 6 (U. S. Comp. Stats. Ann., 1916, sec. 4589). To meet the requirements of the law as interpreted by the Land Department, the substantial, continuous occupancy of the land by the entryman was essential. James A. Hagerty, 35 L. D., 252; Fred Lidgett, *Id.*, 371. A higher degree of compliance with the law is required than under the ordinary final proof.
>
> Since, as averred in the answer, the allowance of the entry and the issuance of receipt and certificate were obtained by false representations that relator Newton, both before and after the withdrawal and up

> to submission of proof, had resided continuously upon the land, the word 'continuously' has an added and specific significance and importance."

It will be remembered that your relator, in perfecting his homestead entry, availed himself of the provisions of section 2301 of the Revised Statutes, commonly known as the commutation provision of the homestead law. This section originally read:

> "SEC. 2301. Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section twenty-two hundred and eighty-nine from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the Government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights."

Under the pre-emption law any person who made settlement on public lands subject to pre-emption, and who inhabited and improved the same and erected a dwelling thereon, was authorized, on making proof of such facts, to purchase the land so settled upon. It will be noted that no period of residence was exacted. In the administration of the law, however, a period of six months following the settlement was required. When the homestead law was passed, a provision was inserted granting the right of pre-emption to those making a homestead entry—that is, granting the right to complete the homestead in the same manner as a pre-emption—and this became section 2301, above quoted. This section 2301 was amended by section 6 of the act of March 3, 1891, being the preceding section to the one under which your relator seeks the protection of this court, and as amended section 2301 reads as follows:

> "SEC. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall here-

> after avail himself of the benefits of section two hundred and eighty-nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months, and the provision of this section shall apply to lands on the ceded portion of the Sioux Reservation by act approved March second, eighteen hundred and eighty-nine, in South Dakota, but shall not relieve said settlers from any payments now required by law."

There is plainly nothing in this amendment suggesting a different quality of residence from that originally exacted under the section before amendment. The only change was a definite period of residence for the indefinite period as required under the pre-emption law. It is not our purpose to extend the argument in this particular further than to show the real nature of the answer filed in this cause, and that any possible suggestion of fraud rests upon an interpretation of section 2301, U. S. R. S., and goes directly, as heretofore stated, to the question of your relator's compliance with the requirements of the homestead law, more particularly as to the quality of his residence, a matter clearly foreclosed to investigation by the Land Department, where no proceeding had been begun within two years from the issuance of the receiver's receipt on final entry.

It is further contended on the part of the plaintiffs in error that the proviso to section 7 of the act of March 3, 1891, was only for the protection of *bona fide* claimants, and it is assumed from this contention that the Land Department continued to retain jurisdiction to inquire whether the party making the entry was a *bona fide* claimant, even after the two-year period had expired. It is said, on pages 21 and 22 of plaintiffs' brief, filed in this court:

"It is important to observe that the solicitude of Congress in the enactment of the legislation was for the *bona fide* claimant and it was for his relief and his benefit. To interpret it otherwise would be to impute to Congress a purpose to condone and regard fraud.

A further indication that the proviso was not to apply when fraud was known is shown by the language of the preceding portion of section 7. After providing for correction of clerical errors with respect to entries on public lands, it proceeds as follows (26 Stat., 1098, 1099):

'And all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to *bona fide* purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a Government agent, fraud on the part of a purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.'

It will be observed that the classes of entries to which that part of the section refers are the same as those covered by the proviso, namely, pre-emption, homestead, desert-land, and timber-culture; further, that the entries are final entries, that is, those upon which proof and payment have been made and certificate issued—again like those specified in the proviso.

But the significant part of the section, so far as it relates to our present consideration, is that it provides for issuance of patents on such entries only in case there has been a transfer or incumbrance of the lands, made more than three years before the act and after final entry, to a *bona fide* purchaser or incumbrancer; but patent is not to issue if it is found upon investigation that the purchaser is guilty of fraud.

Having thus provided for issuance of patent only

where the rights of a purchaser without fraud have intervened, can it be fairly or reasonably asserted that after so protecting the Government against fraud Congress intended in the very next part of the section to provide for issuance of patents, not for the benefit of an innocent transferee but in aid and for the benefit of those who by fraud obtained final receipts and certificates upon their entries? Such inconsistency cannot be imputed to Congress.

Summarized, the section provides, in the part just referred to, for the protection of *bona fide* purchasers; in the proviso, for the protection of *bona fide* entrymen. Neither fraudulent purchasers nor fraudulent entrymen are entitled to the benefits of the law."

In answer thereto, we call the attention of the court to the fact that the purpose and protection extended by the *body* of section 7 of the act of 1891, and by the *proviso* attached thereto, are clearly separate and distinct. The body of the section was designed to protect *bona fide* purchasers or encumbrancers where the land had been sold or encumbered after final entry and before March 1, 1898. In such a case no inquiry was to be made, or further prosecuted, regarding the validity of the entry sold or encumbered, there being a complete confirmation of the entry in favor of such purchaser or encumbrancer. The confirmation was effective even as against pending proceedings begun by the Government, or on contest against the entry begun by an individual challenging the validity of the entry or the entryman's compliance with law. The only saving clause was that in favor of an adverse claim originating prior to final entry.

With respect to the proviso, its purpose was entirely different. Suspension of final entries on vague and indefinite suggestions of fraud or non-compliance of law to await investigation by special agents created a practical blockade in the Land Department in the issuance of patents on the classes of entries named, and to correct this situation, and provide

against its repetition, the proviso was directed. To accomplish this, the period of the suspension and investigation in the Land Department, *prior to the issuance of patent*, was limited to two years following the issuance of the receiver's receipt on final entry, and where, at the expiration of that time, there was no pending contest or protest, or, in other words, no proceeding had been begun challenging the validity of the entry, the patent was to be issued, but in the issuance of such patent there is no confirmation either in favor of the entryman or any possible transferee. As said by this court in the Hoglund case, *supra*:

> "In the exercise of its discretion Congress has said, in substance, by this statute, that for two years after the entryman submits final proof and obtains the receiver's receipt, the entry may be held open for the initiation of proceedings to test its validity, but if none such be begun within that time, it shall be passed to patent as a matter of course."

With the issuance of patent, the jurisdiction for inquiry *in any regard* respecting the entryman's right to a patent is transferred to the courts. In a case coming within the provisions of the body of said section, all further proceedings are barred either in the Land Department or in the courts, but a patent issued in obedience to the proviso is open to attack in the court, as is any other patent issued in regular course under the public-land laws. So that if any fraud can be shown with regard to the procurement of either original or final entry by the relator, as said by the court below, "it can be remedied in the courts, as Congress has expressly directed."

But, it is said:

> "The Secretary of the Interior would do a vain and foolish thing to issue a patent on an entry where fraud was shown and immediately after issuing the

> patent to ask the Attorney General to bring suit to cancel it. Much more would it be an anomalous thing for a court of justice in the face of fraud to compel the performance of an act in order that the consequences of that act might be avoided in a subsequent suit."

Opposing counsel fail to grasp the purpose of the proviso to section 7, here under consideration. The sole purpose of that proviso was, as before stated, to limit the jurisdiction of the Secretary of the Interior with respect to investigation regarding the validity of a final homestead where no proceeding challenging the validity was begun within the two-year period named therein. Without jurisdiction, it is not within the competency of the Secretary of the Interior to investigate and adjudge an entry fraudulent, and the cases referred to in this particular are clearly distinguishable from that at bar. The case of Knight *vs.* United States Land Association, 142 U. S., 161, involved a survey of a private grant which had received the approval of the Commissioner of the General Land Office. The matter was brought to the attention of the Secretary of the Interior, and that officer refused to approve of the action of his subordinate and directed a further survey, and his action in that regard was questioned in the case referred to. In disposing of the matter, this court quoted approvingly from the Secretary's decision. (See p. 178 of the Opinion.) This quotation is taken from the decision of the Land Department, 5 L. D., 494, and is as follows:

* * * * * * *

> "The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to

the rights of the public land and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter."

It will be noted that the matter there under consideration was clearly within the jurisdiction of the Land Department. This jurisdiction ordinarily continues until the issuance of patent on a homestead entry, and so long as the matter is within the jurisdiction of the Department it might rightly refuse to issue a patent if, in its opinion, it would be its duty, if it issued the patent, to institute a proceeding at once to set it aside. But the clear difference between that case and the case at bar is that a statute of the United States has interposed terminating the jurisdiction of the Interior Department for

the purpose of investigation into the validity of the entry and directing the issuance of patent. In so doing, it must have been contemplated that cases might arise where suit would be advisable after the issuance of the patent, for by the following section, namely, section 8 of the act of 1891. it was provided:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The possibility of suit, however, cannot be made the basis for extending the jurisdiction of the Land Department, lost through its failure to institute proceedings against a final homestead entry within two years following the issuance of the receiver's receipt on final entry. To grant the contention of opposing counsel in this matter would have that effect. The real purpose of the proviso to said section 7 is, as before stated, to transfer the jurisdiction after the expiration of the two-year period to the courts if attack upon the entry is to be thereafter made, and at the same time to clothe the entryman with the protection of a patent. The remaining cases cited by counsel in this regard do not arise under the public-land laws, and in nowise involve matters that in the slightest degree reflect upon the sole question here, namely, the jurisdiction of the Secretary of the Interior to inquire or make judgment or finding with respect to the validity of a homestead entry or the entryman's compliance with law where, within the period of two years following the issuance of the receiver's receipt on final entry, no proceeding challenging the validity of the entry had been begun.

It therefore follows:

First. That the decision of this court in the Hoglund case fully disposes of the case at bar, and requires the issuance of patent to your relator as sought in these proceedings;

Second. That no question of fraud is properly put in issue in these proceedings, even if a charge of fraud would be within the province of the Land Department to inquire, after the expiration of the two-year period following the issuance of the receiver's receipt on final entry and when within that period no proceedings had been begun challenging the validity of the entry;

Third. That the issuance of patent to your relator will but open the way to appropriate proceedings in the courts to test your relator's right thereto under the homestead law and his compliance shown thereunder, and

Fourth. That if upon a mere charge of failure to comply with the law lodged against an entry after the two-year period named in the statute had run, proceedings can then be begun in the Land Department to investigate whether there has been a *bona fide* compliance with law on the part of the entryman, or, in other words, whether the claimant is a *bona fide* entryman, entitled to the protection extended by the proviso to section 7, here in question, the statute is robbed of its effectiveness and becomes a dead letter, for, in this way, the jurisdiction lost by the expiration of the two-year period is revived, and the period of investigation is continued at the pleasure of the officials charged with the administration of the law.

ALEXANDER BRITTON,
F. W. CLEMENTS,
Attorneys for Appellee.

APPENDIX.

Copy.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 23, 1912.

D-18101.

Ex Parte ALLEN L. NEWTON.

"R."
Seattle 0782.
H. E. cancellation.
Affirmed.

Appeal from the General Land Office.

Allen L. Newton has appealed to the Department from the decision of the Commissioner of the General Land Office of June 27, 1911, sustaining the local officers, holding for cancellation his homestead entry No. 18956 (serial 0782), made September 8, 1904, for the N. E. ¼ S. W. ¼, W. ½ S. W. ¼, and S. W. ¼ N. W. ¼, section 20, T. 23 N., R. 10 E., Seattle, Washington, land district. Commutation proof was submitted upon said entry and final certificate issued thereon November 21, 1904, settlement being alleged upon the land about the first of October, 1902. The tract, with other lands, was temporarily withdrawn December 18, 1902, and embraced within the Washington National Forest (now Snoqualmie), March 2, 1907.

The plat of survey of said township 23 was filed in the local office September 8, 1904. Proceedings were directed against said entry November 27, 1908, based upon the adverse report of a forest officer, charging:

(1) That claimant never established and maintained residence on the land.

(2) That none of the land has been cleared or cultivated.

A hearing was had before the local officers in March, 1910, the Government being represented by a special agent, assisted by a forest officer, and claimant appearing in person with counsel and witnesses.

The record has been examined and it is found that the facts shown by the testimony are clearly and sufficiently set forth in the decision of the Commissioner and fully warrant the conclusion that the claimant did not in good faith establish and maintain residence on the land to the exclusion of a home elsewhere. The decision appealed from is affirmed.

(Signed) CARMI A. THOMPSON,
Assistant Secretary.

Copy.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
SEATTLE, WASHINGTON, *July* 7, 1908.

Hon. Commissioner
General Land Office,
Washington, D. C.

Through E. W. Dixon,
Chief of Field Div., G. L. O.,
Spokane, Wash.

SIR:

Allen L. Newton made homestead entry No. 18956, Sept. 8, 1904, for the N. E. ¼ of S. W. ¼ W. ½ of S. W. ¼, and S. W. ¼ of N. W. ¼ of section 20, T. 23 N., R. 10 E., W. M., and after duly advertising the land submitted proof under commutation and on November 21, 1904, final cash certificate, No. 20461, issued as a basis for patent.

On May 28, 1906, former Chief of Division Dennett reported, as follows:

> "I have collected sufficient evidence in this case to warrant my filing a protest against the issuance of patent. I do this at this time before making a formal report on form 4-480 in order to prevent the two years statute from running in favor of the entryman."

I do not find that any further action was taken in the matter and no report (form 4-480) appears to have been filed.

On the 27th and 28th of June, '08, I examined this tract of land, took note of the improvements thereon and interviewed different persons with reference to the entryman at North Bend and Snoqualmie, Wash., and later interviewed the entryman in the case who now appears to be residing at Everett, Wash.

The entryman in this case appears to be one among four who settled on lands in this township prior to the date of the survey and the filing of the plat on Sept. 8, 1904, all of whom, except the one under consideration, have received their patents. All, except one who availed himself of army service, submitted proof under commutation and paid the double-minimum price of $2.50 per acre for their lands, same being within the place limits of the Northern Pacific R'y Company. They all lived at Snoqualmie and Falls City, Wash., when not residing upon their places and conducted businesses of different kinds at the places stated, and were men with families, with the exception of the said Newton. The houses constructed by the four homesteaders are exactly of the same dimensions, viz: 12 x 14 feet, constructed of the same material, and the work done in the way of clearing up land is, approximately, the same.

I tried to find persons who were in position to know in a very substantial way as to the residence of the said Newton and as to the character of evidence which might be procured

in the event it was found proper to make an adverse report and recommend a hearing.

Those with whom I have talked, merchants and business men of North Bend and Snoqualmie, Wash., express the opinion that the said Newton made a substantial residence on the tract of land during the late spring, summer and fall of the two years prior to the date he submitted proof and state that a better residence was made by the said Newton than the others who have received their patents, giving their reasons for making such statement that the said Newton was an unmarried man and was at all times in position to go when conditions in the mountains would permit, as he had trustworthy persons to put in charge of his business. The several parties interviewed stated that all the testimony they could give would certainly be in the interest of the entryman and venture the opinion that no one can be found who will be willing to testify adversely, except to state that the entryman did reside a portion of his time at Snoqualmie, Wash., when not on his land.

It is evident to my mind that the entryman, Newton, as well as the other three who have received their patents, have not literally complied with the requirements of the homestead law, but evidence sufficient to procure a cancellation of this entry can not be obtained. I am further convinced that the only reason why any complaint has been made against the said Newton is by reason of political differences which have involved the party from whom he has borrowed money with which to pay for his land and to perfect some business deals, viz: James Ryley. This statement is based upon the talk I had with a party of several business men at Snoqualmie, and particularly the most prominent merchant of the place, Mr. Nye, who asserts that he has heard a statement, in the presence of several witnesses, to the effect that it was the intention to see the said Ryley, the mortgagee, lose the amount loaned to the entryman.

The entryman has upon his place, in addition to the house

referred to in the foregoing report, furnishings of the usual character found, viz., bed, bedding, cooking utensils, stove, etc. About ¾ of an acre cleared and several spots appeared to have been planted to garden, but nothing grown during the present or last year. A part of the land can be cultivated but, like the rest of the township, is heavily timbered.

Affidavits have been furnished by the entryman, showing that he is still the owner of the land and from Albert E. Conover, Frank L. Park and Peter Kenedy as to the acts of the entryman, all of which will be found inclosed.

I am unable to find evidence to warrant adverse action against this entry and must therefore recommend same be passed to patent.

Very respectfully,
(Signed) PERCY F. SMITH,
Special Agent of the G. L. O.